

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

## APRIL PATTON

## Claimant

VS.

# WINFIELD STATE HOSPITAL

Respondent

AND

STATE SELF INSURANCE FUND

Insurance Carrier

AND

## KANSAS WORKERS COMPENSATION FUND

Docket No. 166,606

## ORDER

**ON** the 14th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Assistant Director David A. Shufelt on November 16, 1993, came on for oral argument by telephone conference.

## APPEARANCES

The claimant appeared by her attorney, Steven R. Wilson, of Wichita, Kansas. The respondent and insurance carrier appeared by their attorney, Billy E. Newman, of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Cortland Q. Clotfelter, of Wichita, Kansas. There were no other appearances.

## RECORD

The record as specifically set forth in the Award of the Assistant Director is herein adopted by the Appeals Board.

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Assistant Director are herein adopted by the Appeals Board.

## ISSUES

- (1) What is claimant's average weekly wage?
- (2) What is the nature and extent of claimant's disability, if any?

- (3) Is claimant entitled to unauthorized medical?
- (4) Is claimant entitled to future medical benefits?
- (5) Is claimant entitled to additional temporary total disability payments?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and in addition to the stipulations by the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The Appeals Board in computing claimant's average weekly wage finds that the computations of Assistant Director David A. Shufelt contained in paragraph 1 of the November 16, 1993 Award, are accurate and appropriate and that claimant's average weekly wage including discounted remuneration computes to \$434.71 per week.

(2) The Appeals Board, after reviewing the entire file, finds that claimant has shown by a preponderance of the credible evidence that she is entitled to a thirty-five and one-half percent (35.5%) permanent partial work disability as a result of injuries sustained on April 19, 1991, arising out of and in the course of her employment with Winfield State Hospital.

The claimant, a mental retardation technician, was employed with Winfield State Hospital caring for profoundly retarded ambulatory teenage boys.

Her job responsibilities included assisting patients with daily care involving brushing their teeth, bathing, and feeding, and included lifting, carrying and diaper changing. Her job duties required repetitive lifting and bending with weights in the 50 to 100 pound range.

On May 1, 1991, the claimant was assisting a patient to change his pants when he suddenly dropped to the floor. The claimant attempted to grab the patient to prevent him from hurting himself and experienced an immediate onset of pain in her low back.

The hospital was advised and claimant was referred to Dr. George Sturich for treatment. After being off work for two weeks the claimant was returned to her normal duties although she continued to experience back pain.

On August 20, 1991, the claimant was assisting a patient when the patient, while being moved from his wheelchair, suffered a seizure causing both the patient and the claimant to fall to the floor. Claimant again experienced low back pain and was again referred to Dr. Sturich.

After conservative care, claimant was released to work in October, 1991, with specific restrictions. The respondent accommodated claimant within these restrictions until February 4, 1992, at which time she was terminated due to the respondent's inability to continue this accommodation.

The claimant was referred to Dr. Paul Stein, a neurosurgeon, who diagnosed through the use of x-rays, a CT scan and a myelogram, lumbar disk disease and chronic lumbar strain. Dr. Stein restricted claimant to maximum lifts of 30 to 35 pounds with no repetitive bending or twisting, i.e., three to four times per hour maximum. Dr. Stein opined that claimant could not return to work in her original capacity with Winfield State Hospital and rated her functionally at five to ten percent (5-10%) permanent partial impairment to the whole body.

Claimant was referred to vocational rehabilitation and after a period of time did obtain employment as a Program Worker II with the State of Kansas at a starting salary of \$1,150.00 per month. At the time of the regular hearing claimant was working as a case manager for the elderly at a salary of \$1,575.00 per month plus benefits. The case manager position is a job that claimant can perform within the restrictions placed upon her by Dr. Stein.

The medical records of Dr. Stein, stipulated into evidence by the parties, are uncontradicted. Uncontradicted evidence which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board, upon review of the entire evidentiary record, finds that claimant has proven by a preponderance of the credible evidence that she has suffered a ten percent (10%) permanent partial general body disability on a functional basis. As such, ten percent (10%) is the minimum award to which claimant is entitled.

K.S.A. 44-501(a) states in part:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all of the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The testimony of claimant regarding her inability to return to her former employment is supported by the stipulated medical evidence and the restrictions placed upon the claimant by Dr. Stein.

The Appeals Board is persuaded by a preponderance of the credible evidence, after reviewing the entire record, that the claimant is physically unable to return to her former employment as a CNA with Winfield State Hospital and, the evidence as a whole, supports the claimant's contention that she has suffered a work disability as a result of her injuries.

K.S.A. 1992 Supp. 510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

Claimant was referred to Jerry Hardin for analysis of her ability to perform work in the open labor market and to earn a comparable wage. Mr. Hardin opined that the claimant while being able to do some jobs at a comparable pay rate, has an open labor market access loss of 50 to 60 percent. The Appeals Board finds this testimony to be credible and uncontradicted and has not been shown to be untrustworthy and thus is adopted by the Appeals Board as appropriate in this matter. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

Mr. Hardin also opined that claimant has suffered a forty-six percent (46%) reduction in her ability to earn comparable wages based upon a \$200.00 potential average weekly wage. This information, while being Mr. Hardin's opinion, is clearly contradicted by the claimant's testimony which shows that she is capable of earning \$1,575.00 per month as that is the wage she was earning at the time of the regular hearing. The Appeals Board finds claimant has suffered a sixteen percent (16%) loss of ability to earn a comparable wage based upon her actual earnings.

"In so construing K.S.A. 1989 Supp. 44-510e(a), we conclude that the reduction of the claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered in determining the extent of permanent partial general disability.

In order to arrive at a percentage, a mathematical equation or formula must necessarily be utilized. The district court determined to give each element equal weight and average the two to arrive at a percentage. The statute is silent as to how this percentage is to be arrived at, and, absent any indication as to how this is to be accomplished, we cannot say that the district court erred in the method adopted and applied in the instant case." Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990); Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 51, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

This statute requires a balancing of the claimant's ability to perform work in the open labor market and the claimant's ability to earn a comparable wage. These factors must be considered in light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1990 Supp. 44-510e(a).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

The Appeals Board, in reviewing the testimony of the claimant and that of Mr. Hardin find that the claimant has suffered a loss of access to the open labor market of fifty-five percent (55%) and a loss of ability to earn comparable wages of sixteen percent (16%). In applying the rationale and formula approved in Hughes, by combining the fifty-five percent and sixteen percent, this Appeals Board finds that claimant has suffered a thirty-five and one-half percent (35.5%) permanent partial general disability.

(3) K.S.A. 1992 Supp. 44-510(c) states in part:

"Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis, or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$350."

In this matter claimant was examined by Dr. Sturich and by Dr. Stein both of whom appear to be authorized. As such there is no evidence in the record to indicate claimant incurred unauthorized medical expenses. The Appeals Board finds claimant is not entitled to reimbursement or payment of unauthorized medical expense in this matter.

(4) The Appeals Board finds that claimant is entitled to future medical treatment upon proper application to and approved by the Director.

(5) The Appeals Board finds that subsequent to the injury of May 1, 1991, claimant was unable to work for 2 weeks. Following a reinjury on August 20, 1991, claimant was again unable to work for a period of 2.72 weeks. This evidence is uncontradicted and found to be credible. The Appeals Board finds claimant is entitled to 4.72 weeks of temporary total disability at the rate of \$252.84 per week for a total of \$1,193.41.

The record indicates an agreement has been reached between the respondent and the Kansas Workers Compensation Fund. A review of the record fails to disclose the terms of this stipulation; but as the Assistant Director has found that the agreement between the respondent and the Kansas Workers Compensation Fund regarding the apportionment of liability is appropriate, and as no appeal was requested on this issue, the Appeals Board will not disturb this finding. Therefore, the award herein accessed against the respondent is subject to any agreements reached between the respondent and the Kansas Workers Compensation Fund.

While the claimant has testified to injuries in May and August, 1991, the parties have stipulated to an April 1, 1991 injury. The Appeals Board finds it is the intent of the parties that the stipulated date of injury encompasses the subsequent dates of injury such that they all be included in a single award.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that an award is hereby entered in favor of the claimant, April M. Patton, and against the respondent, Winfield State Hospital, and the State Self Insurance Fund, and the Kansas Workers Compensation Fund as follows:

The claimant is entitled to 4.72 weeks of temporary total disability at the rate of \$252.84 per week in the sum of \$1,193.41, plus 35.42 weeks of permanent partial general body disability at \$89.76 per week for a sum of \$3,179.30 followed by 374.86 weeks of permanent partial general body disability at the rate of \$102.89 per week in the sum of \$38,569.34 for a 35.5 percent (35.5%) permanent partial general disability making a total award of \$42,942.05.

As of February 1, 1994, there would be due and owing to the claimant 4.72 weeks of temporary total disability at the rate of \$252.84 per week in the sum of \$1,193.41, plus 35.42 weeks of permanent partial disability at the rate of \$89.76 per week in the sum of \$3,179.14, plus 105.57 weeks of permanent partial disability at the rate of \$102.89 per week in the sum of \$10,862.10 for a total due and owing of \$15,234.65 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$27,707.25 shall be paid at the rate of \$102.89 per week for 269.29 weeks or until further order of the Director.

Further award is made that the claimant is entitled to future medical only upon proper application to and approved by the Director.

Further award is made that the claimant is denied unauthorized medical at the expense of the respondent and the Kansas Workers Compensation Fund.

Further award is made that claimant is entitled to payment of the billings of Dr. Sturich and Dr. Stein as authorized medical expenses.

Further award is made that the respondent and insurance carrier are entitled to

reimbursement from the Kansas Workers Compensation Fund pursuant to the terms of the stipulation agreed to between the parties. Said agreement should be filed of record with the Division of Workers Compensation.

Further award is made that the claimant's contract of employment with her counsel is hereby approved pursuant to K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed against the respondent, the insurance carrier and the Kansas Workers Compensation Fund according to the stipulated apportionment agreed to between the parties to be paid as follows:

BARBER & ASSOCIATES	
Transcript of Regular Hearing	\$ 74.65
Deposition of Jerry D. Hardin	\$ 291.60
	<u>\$ 366.25</u>
	TOTAL
IRELAND COURT REPORTING	
Continuation of Regular Hearing	\$ 223.78

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Steven R. Wilson, 1861 North Rock Road, Suite 320, Wichita, Kansas 67206  
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David A. Shufelt, Assistant Director  
George Gomez, Director